No. 04-594

IN THE

Supreme Court of the United States

LAWRENCE (BUD) MOON, JR., *et al.*,

Petitioners,

v.

NORTH IDAHO FARMERS ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONERS

The petition presents a clear-cut case of the Idaho Supreme Court ("ISC") affirming and sanctioning Idaho legislation, I.C. § 22-4803A(6), that is repugnant to the Constitution of the United States and in blatant disregard of inalienable property rights. For two months out of the year, Respondents' state-sanctioned conduct either evicts Petitioners from their homes or imprisons them inside. (Pet. 4-5.) The ISC's decision recognizes that Idaho thus seizes Petitioners' homes, permits Respondents—strangers—to occupy their homes as co-tenants in possession, and simultaneously denies Petitioners any remedy in the courts of law, as it bluntly explained:

> [I.C. § 22-4803A(6)] entitles the grass farmers to invade the property of the plaintiffs' [*sic*] with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke. [Pet. 15a.]

The ISC's ruling thus properly understands that the harm caused results from the state authorizing Respondents to "**invade**" Petitioners' property and domain. Yet, in direct conflict with this Court's holdings in *United States v. Causby*, 328 U.S. 256, 261 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), concerning the use of one's airspace and numerous other takings cases, and as applied to the facts,[1] the ISC held that Idaho did not violate the federal Constitution. (Pet. 20a.)

1. As the petition explained, the ISC's ruling squarely conflicts with the rulings of this Court and other state's high courts interpreting the federal Constitution and one's right to exclusively possess their home, to be secure in their home, and to exclude all others from occupying their home. *E.g.*, *Payton v. New York*, ~~445 U.S. 573, 589~~ (1980) ("The right of the people to be secure in their . . . houses . . . shall not be

1. Petitioners brought an "as applied" constitutional challenge. (Pet. 6a; *but see also* Pet. 20a-21a ("facial" challenge under Article § 1, sec. 1 of the Idaho constitution); Opp. 8 (quoting Pet. 20a-21a, and incorrectly suggesting that the takings challenge was also a "facial" one)). Contrary to Respondents' statement, Petitioners challenge under the U.S. constitution was "as applied." (Pet. 6a.)

violated"); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *Causby, supra*; *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914); *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883); *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998). In fact, until now, no other court has ever ruled to the contrary, as it has long been the law that the U.S. Constitution limits legislative power, and that "**the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.**" 66 C.J.S. *Nuisances* § 7, at 738 (1950) (emphasis added). This is the "great principle of the common law." *Fifth Baptist Church*, 108 U.S. at 331.

The **State of Idaho agrees** that the petition presents a conflict between its high court's ruling and that of the Iowa Supreme Court in *Bormann* (Amicus 18), and that Petitioners have properly alleged I.C. § 22-4803A(6) to be conflict with the federal Constitution. (Amicus 12.) Similarly, Respondents also agree that the ISC's ruling conflicts with *Bormann*. (Opp. 12-13.) But, in an effort to dissuade the Court from accepting the petition, both Idaho and Respondents attempt to minimize the acknowledged conflict, claiming property rights in possessing and excluding others from your home in Idaho are different than those in Iowa. In particular, they contend that the authority to maintain a nuisance or trespass impacting another's property is an easement in Iowa while in Idaho it is not. (Amicus 18; Opp. 13.)

However, as the petition explains, whatever the precise state-law label ascribed to I.C. § 22-4803A(6), or given to nuisances, trespasses, or easements throughout the various states, there is no dispute that through I.C. § 22-4803A(6) Idaho has granted Respondents an easement without providing Petitioners any legal remedy. Using the words of the ISC, Idaho has (i) granted Respondents use of Petitioners' property as a smoke thoroughfare; (ii) the smoke "prevent[s] the plaintiff

landowners from full possession, use, and quiet enjoyment of their land;" and (iii) the State has also "den[ied] [Petitioners] a remedy from the invasion from the farmers' smoke." (Pet. 15a.) The ISC thus deprived Petitioners from obtaining damages or an injunction to stop the unwanted invasions into their homes in the years to come. Accordingly, a "permanent physical occupation has occurred" as "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 831-32.

Under settled jurisprudence and the holdings of this Court, the ISC's decision violates the prohibitions contained in U.S. Constitution. Moreover, the interstate conflict presented by this case coupled with the important—indeed, fundamental—constitutional rights at stake justifies the granting of certiorari. Quite simply, it is not the case that the U.S. Constitution protects a different set of property rights in Boise, Idaho than those that it protects in Des Moines, Iowa.[2] To the contrary, the property rights at issue are inalienable, granted by natural law, and those that this Court and this country deem essential to freedom; no state may redefine them or take them away without providing a means of compensation. "A State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

While conceding or at least not disputing the above, Respondents and the State of Idaho contend that the petition is premature. Respondents and the State are mistaken.

2. The Court has jurisdiction because the ISC has rendered a decision concerning the validity of a state statute that Petitioners allege is "repugnant to the Constitution." 28 U.S.C. § 1257(a). Nothing more is required. *Loretto v. Teleprompter*

2. It is also significant that the class Petitioners represent includes Washington citizens who reside in Spokane County. (Pet. 115a.) The fact that the ISC determined Washingtonians constitutional rights in a manner that is contrary to Washington jurisprudence, *see Tiegs v. Watts*, 954 P.2d 877, 884 (Wash. 1998), creates an interstate conflict sufficient to invoke the Court's original jurisdiction, and thus magnifies the importance of this Court granting review.

Manhattan Catv Corp., 458 U.S. 419 (1982); *Charleston Fed. Sav. & Loan v. Alderson*, 324 U.S. 182, 185 (1945). ("Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal.") Indeed, there is no dispute that the ISC's decision concerning the constitutionality of I.C. § 22-4803A(6) as applied to Petitioners is final. (Pet. 20a.) Nor is there any dispute that the ISC held that the State did *not* violate the federal Constitution by granting Respondents the right "to invade the property of the plaintiffs[] with the smoke from their burning fields" and simultaneously "prevent[ed] the plaintiff landowner from full possession, use, and quiet enjoyment of their land and den[ied] them a remedy from the invasion from the farmers' smoke." (Pet. 15a.) Thus, because one of the primary purposes of the Court's review is to restrain unconstitutional legislation, and because the ISC's decision concerning the constitutional validity of the state statute is final, the petition satisfies section 1257. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986).

3. Despite agreeing with the petition that the ISC's judgment upholding the statute against the constitutional challenge is a final judgment, Respondents and Idaho contend that the ISC's decision is not "final" under § 1257. Specifically, Respondents and Idaho contend that under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), the Court purportedly lacks jurisdiction because Petitioners' state-law tort claims will proceed and there is no judgment on the merits. (Opp. 8-10; Amicus 11-15.) But, as is explained below, *Jefferson* is inapposite as the petition also satisfies three of the four *Cox Broadcasting* exceptions to the final judgment rule. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

a. According to this Court, under 28 U.S.C. § 1257, the final judgment rule is given a pragmatic interpretation, and thus the Court permits review of state court decisions even though further proceedings are anticipated in the state courts. *Cox*, 420 U.S. at 478. This Court has already identified four situations in which a judgment is deemed final under section

1257 even though further state proceedings are contemplated. Three of the four categories apply here.

First, contrary to Idaho's contention (Amicus 12-13), the first *Cox* exception clearly applies to the pending takings action that the Petitioners filed against the State of Idaho after I.C. § 22-4803A(6) was enacted. (*See* Amicus 2-3, identifying companion case.) Indeed, the ISC's ruling on the takings issue is "conclusive" and "the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. Under similar facts, in *Pierce County v. Guillen*, 537 U.S. 129, 141-43 (2003), this Court upheld its jurisdiction to resolve the federal issue involved in a Public Disclosure Act ("PDA") case even though there existed a second, related tort case involving the same federal issue which was not "final." The difference between this case and *Guillen* is that in *Guillen* the Washington state courts consolidated the tort action with PDA claim on appeal while Petitioners' tort case is not consolidated with their takings case.[3] This distinction is immaterial given the pragmatic reading of finality, as the ISC's ruling at issue is "conclusive" and "the outcome of further proceedings" in Petitioners' takings case is "preordained."

b. Second, contrary to the State's contentions (Amicus 13), the federal constitutional issue will survive irrespective of the outcome on Petitioners' state-law claims. Regardless of whether Petitioners prevail or lose on the merits of their tort claims, the constitutional question of whether the State of Idaho can, as a legitimate exercise of governmental power, authorize private conduct that "entitles the grass farmers to invade the property of the plaintiffs" and, at the same time, deny Petitioners any legal remedy for that invasion, will remain. In such circumstances, jurisdiction under § 1257 is proper. *Cox*, 420 U.S. at 480. Indeed, this case satisfies the second *Cox* exception precisely because the ISC has adjudicated the only federal constitutional questions that could possibly

3. The State was a defendant in the underlying action. After the court's ruling on the State's motion to dismiss (Pet. 151a-194a), Idaho was dismissed voluntarily as a defendant. The State, however, actively participated throughout the case, appeared at hearings, submitted briefs, and presented oral argument on the constitutional issues.

come to the Court, and the remaining state court proceedings "will not give rise to any further federal question." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 612 (1989) (citing *Cox*, 420 U.S. at 480 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945))); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 n.11 (1988).

c. Third, this case satisfies the fourth *Cox* exception as well. This is a case where the federal constitutional issues have been conclusively decided by the ISC and where Petitioners might prevail on non-federal tort claims, thus leaving intact the ISC's erroneous decision concerning fundamental property rights. If unreviewed, the decision undermines this Court's long-standing precedent properly protecting fundamental, inalienable property rights across the nation, including on behalf of Idahoans, Iowans, and Washingtonians. Moreover, a reversal of the ISC's opinion would be preclusive on the "relevant cause of action," i.e. Petitioners' takings claims against the State of Idaho. Therefore, under the pragmatic approach to the question of finality, the ISC's decision was a final judgment on the federal constitutional issues. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988).

d. Despite satisfying the final judgment rule in at least three separate ways, Idaho and Respondents contend that *Jefferson* is dispositive and the Court thus lacks jurisdiction. However, *Jefferson* involved an ordinary § 1983 tort suit for damages where the federal issue decided by the Alabama high court was whether the Alabama Wrongful Death Act governed the plaintiffs' potential recovery for the City's alleged constitutional torts. 522 U.S. at 79. The Alabama Supreme Court held that its Wrongful Death Act applied, and thus under a prior ruling of the court, plaintiffs could only recover punitive damages against the City under their § 1983 claims. *Id.* However, this Court had also held that punitive damages could not be recovered against a municipality under § 1983, and thus the plaintiffs argued they would not be entitled to any damages for their § 1983 claims. *Id.* at 79-80. Significantly, the plaintiffs also alleged state law claims arising out the same facts against the City, two of which provided for compensatory damages.

Clearly, the *Jefferson* case differs from the petition in several significant respects. First, the federal issue in *Jefferson* could be mooted by resolution of the underlying case, *id.* at 82, whereas here, the continuation of Petitioners' tort claims in Idaho cannot possibly moot the federal constitutional issues already adjudicated; resolving a nuisance and trespass claim will say nothing about whether Idaho's legislation was constitutional. Moreover, the ISC has resolved conclusively and foreclosed Petitioners' companion case against the State. No lawsuit in *Jefferson* was brought to an end.

Third, assuming that the plaintiffs in *Jefferson* prevailed yet recovered less than they might have had Alabama's Wrongful Death Act not applied to their § 1983 claims, they still had an adequate remedy at law by seeking certiorari at the conclusion of their underlying case. In contrast, Petitioners do not have an adequate remedy later. The principal reason Petitioners brought this case was to obtain injunctive relief and enjoin Respondents' conduct. (Pet. 111a, 122a.) One of the effects of the ISC's ruling is to deprive Petitioners of any opportunity to enjoin Respondents' field burning in the future. This aspect of the case is critical. According to the trial court, Respondents' conduct renders Petitioners' homes uninhabitable. (Pet. 138a.) Indeed, the ISC accepted this factual finding as it, too, acknowledges that I.C. § 22-4803A(6) "entitles the grass farmers to invade the property of the plaintiffs" which thereby "prevent[s] the plaintiff landowner from full possession, use, and quiet enjoyment of their land . . ." (Pet 15a.) Moreover, the trial court also found, as a matter of fact and law, that Respondents cause Petitioners' irreparable and great harm. (Pet. 135a-139a); *see also Save Our Summers v. Washington State Dep't of Ecology*, 132 F. Supp. 2d 896, 905 (E.D. Wash. 1999) (finding injury caused by field burning irreparable); *Heather K. v. City of Mallard*, 887 F. Supp. 1249, 1260 (N.D. Iowa 1995) (same). If review is not accepted now based solely on Respondents' incorrect and overly strict interpretation of the final judgment rule, then Petitioners would be without an adequate legal remedy as delaying justice itself causes them additional irreparable harm. *See Commissioner v. Shapiro*, 424 U.S. 614, 629-30 (1976).

e. In this regard, judicial economy also militates strongly in favor of granting the petition. As this Court has explained, the pragmatic approach to interpreting the final judgment rule under section 1257 encourages the finding of jurisdiction whenever doing so would "avoid the mischief of economic waste and of delayed justice." *Cox*, 420 U.S. at 478 (quote omitted). This Court further explained that this consideration is the "most important" of the competing considerations under final judgment rule. *Id.* at 479. It would be a waste of the parties' resources and judicial resources to press this case to trial only to discover, perhaps years later, that the privilege Idaho granted to Respondents to invade Petitioners' property and domain without a remedy was an unconstitutional and illegitimate act, which it clearly is. (Pet. 11-28.)

Moreover, no government has the right to declare itself a co-tenant-in-possession with a homeowner without doing so in accordance with the Constitution. And here, not only has Idaho declared itself a co-tenant of Petitioners' homes, it has assigned that possessory right to Respondents for a purely private purpose while simultaneously denying Petitioners any remedy. Under these facts, Idaho is flagrantly violating the Constitution. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 716-18 (1999); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Borman, supra; see also Thedorou v. Measel*, 53 Fed. Appx. 640, 643 (3d Cir. 2002) (government takings for private uses are not permitted); *Montgomery v. Carter County*, 226 F.3d 758, 770 (6th Cir. 2000) (same); *Porter v. DiBlasio*, 93 F.3d 301, 310 (7th Cir. 1996) (same); *Armendarez v. Penman*, 75 F.3d 1311, 1320-24 (9th Cir. 1996) (en banc) (same).[4]

4. Redefining a cause of action mid-litigation or denying any remedy without due process also violates the U.S. Constitution. *Alliance Of Descendants Of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("a legal cause of action is property within the meaning of the Fifth Amendment") (citing *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952); *Ware v. Hylton*, 3 U.S. 199, 245 (1796)); *see also Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902) (same re: statute of limitations); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 154 (1913) (shortening statute of limitations while "containing no provision for saving existing rights or giving to them or to others in like situation any opportunity to assert their rights; it was the same in effect as taking their property without due process of law").

4. Remarkably, Respondents and Idaho also contend that Petitioners' constitutional rights have not been adjudicated because Idaho provides a process for bringing inverse condemnation proceedings. (Opp. 16; Amicus 16-18.) Such a contention borders on the absurd. The ISC determined that Petitioners have no viable takings claim under the federal or state constitution. (Pet. 20a.) Furthermore, the contention and suggestion that Petitioners press their inverse condemnation action is futile as the ISC ruled that no taking has occurred, and thus probably also asks Petitioners to subject themselves to sanctions under Rule 11. Neither the law nor this Court requires such action before jurisdiction may be had to review a ruling of any state's high court that upholds a statute against a challenge that alleges such a statute is repugnant to the Constitution.

5. Finally, Idaho also suggests that the Court is without authority to review the ISC's ruling as to what property rights are protected by the U.S. Constitution. (Amicus 18-19.) Idaho specifically contends that because the ISC determined that affirmatively granting someone a right to maintain a nuisance or trespass across someone's property is not a property right recognized in Idaho and that decision about property in Idaho is "ordinarily not subject to this Court's review." (Amicus 18.) Here, however, a picture is worth a thousand words, and the pictures in the petition sharply belie the State's contention that property rights are not being invaded. The smoke generated by field burning is just as much a physical invasion into Petitioners' homes as any corporeal object could ever be. As the Court can see at pages 198a-201a, Respondents' smoke is no campfire, backyard barbeque, or a simple leaf clearing. Instead, it is a thick, opaque wall of smoke, which causes public road closures and Petitioners to evacuate their homes because the smoke makes their homes uninhabitable. (Pet. 136a-138a.) That the State sanctions such conduct—conduct that for all practical purposes seizes Petitioners' homes—yet labels the invasion sanctioned as something other than an interference with private property — just as Florida attempted to do with interest earned on principal in *Webb's, supra* — and then deprive Petitioners of any remedy except selling their homes

and moving away violates the Constitution. *Bormann, supra.* Indeed, through its ruling, the ISC has effectively informed those citizens with immutable airways disabilities, such as cystic fibrosis, that they are not welcome in north Idaho because, unlike the other members of the public, it is these people and only these citizens that must evacuate or imprison themselves in their homes during the field burning season. This Court has repeatedly explained that the Fifth Amendment "is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). The Constitution requires the public to share in the burden now solely borne by Petitioners.

CONCLUSION

The petition presents a fundamental question about property rights. Until the ISC issued its ruling, no court in the history of this country had ever declared that private, non-governmental action could be immunized from legal liability for invading private homes and evicting the homeowners without due process of law. Having now done so, the ISC rendered Petitioners' inalienable rights secured by the Declaration of Independence and guaranteed under the U.S. Constitution a nullity. In such a clear-cut case as the petition, and especially given the existing conflict between the ISC's decision and other states along with Idaho's refusal to follow this Court's precedent, and for all the reasons previously stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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